No. 96-1108

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SPICE ENTERTAINMENT COMPANIES, INC.
Appellant,

—v.—

JANET RENO, ATTORNEY GENERAL; THE UNITED STATES OF AMERICA; THE UNITED STATES DEPARTMENT OF JUSTICE; AND THE FEDERAL COMMUNICATIONS COMMISSION,
Appellees.

ON APPEAL FROM A THREE-JUSTICE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

BRIEF IN OPPOSITION TO THE MOTION TO AFFIRM

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PRELIMINARY STATEMENT

Like the internet case about to be argued, *Reno v. ACLU*, last term's leased- and public-access cable case, *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC* 116 S. Ct. 2374 (1996) ("*DAETC*"), and the earlier "dial-a-porn" cases, *e.g. Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), this case involves a content-based law designed to make specified speech unavailable unless willing speakers or willing listeners surmount various Congressionally-erected hurdles to access to such speech. Strict scrutiny is therefore required to ensure that such restrictions do not become effective unless they are *necessary* to "promote a compelling interest," "the least restrictive means to further the articulated interest," and "carefully tailored to achieve those ends." *Sable*, 492 U.S. at 126. *See also Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board*, 502 U.S. 105 (1991). Otherwise, an overzealous new prohibitionism and perceived new legal standards contrary to our tradition of free expression will suppress the possibilities created by the telecommunications revolution.

Given the core First Amendment interests at stake, this case cannot be properly resolved by simplistic analogy to the inapposite technological circumstances that were presented in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); by ignoring that portion of *DAETC* striking down Section 10(b) of the 1992 Cable Act, which is legally indistinguishable from § 505; or by dismissing less-restrictive alternatives, enacted at the same time as the provision at issue here, because they have necessarily not yet been able to demonstrate their efficacy.

Summary affirmance would place this Court's imprimatur on a government-compelled time-channeling scheme that will diminish appellants' viewership by thirty percent in affected cable systems — even though every prior court has deemed time-channeling impermissible for cable television in view of available less restrictive alternatives to advance the identified interest. *See* Spice (formerly Graff) Jurisdictional Statement ("Spice JS") at 5 n.2. Such a result would deviate radically from this Court's precedents, particularly one as recent as *DAETC*, and would confuse the courts, Congress, the industry, and the public about the meaning of this Court's decision in *DAETC*

and the permissible bounds of governmental content-regulation of speech.

ARGUMENT

1. The government bases its argument for summary affirmance on a general rule that absent "exceptional circumstances," "the challenged statute *'should remain in effect* pending a final decision on the merits by [the courts].'" Motion to Affirm ("Motion") at 14 (*quoting Turner Broadcasting Sys., Inc. v. FCC*, 507 U.S. 1301, 1302 (1993) (emphasis added)). There is no such rule in First Amendment cases, particularly where the law sought to be enjoined would alter the status quo. This case differs from all those cited by the government (except *Turner*) because it is a free speech case; and it differs from *Turner* (and from *Bowen v. Kendrick*, 483 U.S. 1304 (1987) (Rehnquist, C.J. in chambers), which the government also cites) because here, maintaining the status quo required granting the preliminary injunction, not denying it. Indeed, the district court recognized as much when, after denying the preliminary injunction, it nonetheless granted (after full briefing) plaintiffs' motion to stay enforcement § 505 pending this Court's review.

Summary affirmance would alter the status quo by removing from cable systems (for two-thirds of each day) constitutionally-protected programming. By contrast, in prior cases, comparable statutes were not permitted to go into effect – and thereby interfere by governmental fiat with available programming – pending this Court's resolution of the First Amendment questions posed. The stays entered enjoining enforcement pending review (without adverse comment from this Court) in *Sable, DAETC*, and *Reno v. ACLU* all contradict the government's unsupported contention that the balance of equities always tips against "enjoin[ing] implementation and enforcement of an Act of Congress . . . during the pendency of litigation." Motion at 14. Nor is there anything in this case that renders the record below any more incomplete or the risk of harm of exposure from the regulated communication any greater than was the case in *Sable, DAETC* and *Reno v. ACLU*,

where federal statutes remained enjoined throughout the pendency of litigation.

Reversing the decision below would simply restore this case to the posture in which First Amendment challenges to telecommunications statutes are usually litigated, and protect the interests of cable systems operators, programmers and willing adult viewers pending this Court's resolution of the issues raised. As Playboy has shown in its Brief Opposing the Motion to Affirm in No. 96-1034 (at 12), this case is appropriate for resolution now, as there are no "issues that remain to be resolved in further proceedings" that are of constitutional significance or that preclude plenary review now. In the meantime, parents who wish to avoid a child's inadvertent exposure to appellants' programming can avail themselves of the parental control devices also mandated by the CDA, and the government is free to publicize their availability.

2. The government's use of *DAETC* to defend the district court's decision is utterly unpersuasive. It not only entirely ignores that portion of *DAETC* striking down § 10(b) of the 1992 Cable Act – the provision most analogous to the restriction under review here – but it analogizes § 505 to § 10(a) of the 1992 Cable Act claiming that both are "permissive." Doing so ignores the evidence and the finding that non-compliant MSOs will comply with § 505 by confining appellants' programming to the 10:00 p.m.-6:00 a.m. safe harbor period, a time when many who would otherwise watch cannot in fact do so. As a result of the district court's decision, cable operators are *required* to block appellants' "indecent" speech entirely from pay-per-view channels except during late night and early morning hours, even though they are free to cablecast identical speech on access channels.

a. The argument that the undisputed *technological* feasibility of full blocking requires rejection of appellants' constitutional challenge to § 505 ignores economics, the fact that appellants have no choice as to how to comply (their speech is subject to the "choice" made by cable operators), and the finding made by the court below that all will comply by time-channeling.

While the court below was certainly correct that "economics alone cannot dictate the result where constitutional rights are at issue" (Motion at 22, *quoting* JS App. 32a), First Amendment analysis looks to the practical impact of governmental measures on speech. Here, that impact is clear from the district court's finding that currently non-compliant cable systems would opt to implement time-channeling as the only reasonable means of compliance. Because time-channeling ensures no risk of violation and avoids substantial capital costs, and because technological approaches cannot be cost-justified (for systems not otherwise engaged in technological rebuilding for other reasons), the finding that "The MSOs that have taken a position on the method by which they would comply with § 505 have all announced that they would adopt time channeling" (JS App. 24a) is beyond challenge. The fact that time-channeling is how cable systems *will* comply renders the means by which they *might* have complied (in another universe where the laws of economics are inapplicable) irrelevant. In short, the issue necessarily is whether the diminution of adult audience that will be caused by time-channeling is permissible, in view of less restrictive alternatives that have been or could be enacted to achieve the same ends.

b. Summary affirmance would, in effect, overrule *DAETC*; it would be a holding by this Court that the government can compel time-channeling regardless of alternative, less-restrictive technical means. That would be not only directly contrary to *DAETC*, but the kind of overreaching holding (as opposed to incremental case-resolving) that the plurality in *DAETC* warned against. 116 S. Ct. at 2385.

That the decision below cannot be squared with *DAETC* is evident from the government's strained attempt to analogize § 508 to § 10(a) (as if restoring to a cable operator the choice of whether or not to cablecast "indecent" speech is analogous to a "choice" between making entirely uneconomic investments in new technology, or blocking certain speech to all households during 2/3 of the broadcast day). Section 505 cannot be characterized as "restoring" to cable operators editorial dis-

cretion that Congress had previously taken away; it is, pure and simple, a content-based restriction on programmer speech ordered by legislative fiat. Unlike § 505, it will certainly result in a direct and substantial diminution of viewership.

Section 10(b), which this Court struck down in *DAETC*, is the closer precedent, and the government gives it only cursory analysis in the Motion (at 19-20). Focussing only on the marginal differences between § 10(b) and § 505 – *e.g.* the 30 day waiting period and written request requirements of § 10(b) – the government ignores the marked similarities between the two provisions that mandate the same result: namely that both measures interfere with the exchange of speech between willing speakers and willing listeners in the purported service of protecting children, without any proof that less restrictive and easily practical measures would not suffice.[1]

The Motion offers no answers to the four questions concerning less restrictive alternatives and necessity posed by the *DAETC* plurality, which are equally pertinent to § 505. *See* Spice JS at 18. Just as the government's lack of answers to those questions dictated striking down § 10(b) in *DAETC*, so too it dictates denial of the motion to affirm. Here, as in *DAETC*, there is no basis in the record for concluding that the challenged restrictions "are a narrowly, or reasonably, tailored effort to protect children." Rather, § 505 is overly restrictive, "sacrificing" important First Amendment interests for too "speculative a gain." *DAETC*, 116 S. Ct. at 2394.

3. The attempt to defend the decision below as an appropriate application of strict scrutiny is rife with error, and does not successfully respond to the errors identified by appellants.

Most importantly, it does not follow, from the fact that time-channeling was upheld as a basis for adverse administra-

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[1] The contention (at 20 n.10) that § 505, unlike § 10(b), "is not aimed at the communication between the programmer and the intended viewer" is inexplicable, given Congress's express provision for compliance through time channeling.

tive action on a broadcaster in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), that it is sufficiently narrowly-tailored to pass scrutiny here. Time-channeling passed constitutional muster in *Pacifica* precisely because it was, as the government here concedes, "the *only* option available" for keeping the offending broadcast from being heard by minors. Motion at 23.

But what is permissible regulation for one medium is not necessarily permissible for another, when differences in technology, and the absence of a scarcity rationale, present a variety of less restrictive means of protecting children that were unavailable in the broadcast context.

It is one thing for the Court to conclude in 1976 that time-channeling was the only way to sufficiently reduce the chances of children hearing George Carlin's "Seven Dirty Words"; there was no way to enable parents from having particular stations blocked from their car or home radios. But cable technology today offers a variety of means for selective, home-by-home protection of children where desired. A single cable television channel, *e.g.*, Spice or HBO carrying Beverly Hills Cop II (which contains a profane word on average every 30 seconds (*see* Playboy Br. at 9)), can be blocked from a single television set through the use of a negative trap, a lockbox or the V-chip. Those options therefore constitute less-restrictive alternatives that render time-channeling insufficiently narrowly-tailored to pass constitutional muster.

The argument for affirmance rests on Senator Feinstein's argument, adopted by the court below and urged by the government here, that the available parental control devices – *e.g.*, negative traps, lockboxes and V-chips – do not "go[] far enough . . . [because they] put the burden of action on the subscriber." Motion at 6, *quoting* 141 *Cong. Rec.* S8167 (daily ed. June 12, 1995). *DAETC* rejected that very argument, however, for the good reasons that (a) it is unsupported by any evidence whatever, and (b) it takes insufficient account of the First Amendment interests of adults, as recognized and found decisive in such cases as *Sable Commun. of Cal., Inc. v. FCC*, 492

U.S. 115, 126 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-74 (1983); and *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

The holding that parental control devices such as the blocking-on-request mandated by § 504 are insufficient and that governmental, not parental, control is required to prevent inadvertent exposure of minors to adult programming is not supported by any evidence, much less substantial evidence, and is contrary to First Amendment jurisprudence in three fundamental respects.

First, holding less restrictive means inadequate on this record switches the burden of proof with respect to the narrow-tailoring prong of the strict scrutiny inquiry from the government to the challengers of laws imposing content-based restrictions on protected speech. But it is the government's burden to prove that the means chosen are both necessary and the least restrictive means that could have been chosen to advance compelling interests. Spice JS at 20-23.

Second, doing so also imposes an impossible evidentiary burden of proving that less-restrictive alternatives – including ones enacted at the same moment as the challenged statute – will in practice achieve the same level of results in preventing the unwanted exposure as the more-restrictive statute under challenge. Obviously, such empirical proof cannot be required only weeks after one less-restrictive alternative, § 504, was enacted, and two years before another alternative, the V-chip, was to take effect. *See* Spice JS at 21-22.

Third, out of a desire to protect "children [who] watch television in the homes of their friends as well as in their own homes," Spice JS 35a, the decision below adopts a rationale that carries censorship far beyond the 1/3 of American homes with children, and imposes it to suppress the dissemination of protected speech to adults to whom the rationale does not apply, for 2/3 of each day notwithstanding the availability of less restrictive means for protecting children. This Court has consistently rejected that approach for other media, and for the good reason that it is directly contrary to the *Butler* principle. By that logic, *Butler*, *Sable*, *Bolger*, and *DAETC* were

all wrongly decided, and classics like *Ulysses* or *Lady Chatterly's Lover* could be barred from open shelves at libraries or bookstores because adults who permit such matter in their homes may inadvertently expose their children's friends to material that would not be permitted in the friends' homes.

The First Amendment does not direct courts to "balance" between free speech, on the one hand, and efforts to serve governmental interests, on the other. The command that "Congress pass no law" renders content-based laws presumptively invalid, and if content-based legislation is permissible at all, *see Simon & Schuster v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 128 (Kennedy, J., concurring), it is only under the narrow circumstances permitted by strict scrutiny. Inescapably, if freedom of speech for adults is to be preserved, some adults may inappropriately within their own homes expose neighbors' children to materials that would not be permitted in the neighbors' homes. But the First Amendment does not contemplate banning sales of *Playboy* magazine altogether, or for 2/3 of every day, because some adult might leave it where a visiting child might see it. The distribution via cable of Playboy or Spice is no different, especially where parents may obtain, promptly and without cost, full blocking by a simple telephonic request for it.

The fact that many cable systems – because of technological choices dictated by other factors and made over decades – are presently incapable of fully blocking audio bleed at the system's head-end cannot justify barring protected speech to adults for 16 hours a day merely because it enters the home via cable. Such a restriction cannot be held necessary, or narrowly tailored, when here (as in *DAETC*) blocking-on request, perhaps joined to informational requirements, can fully block such signals from any home seeking such protection.

Nor, finally, is any different result dictated by the anecdotal evidence cited in the Motion at 5-6. In each case, as previously demonstrated, blocking was immediately provided if sought. Spice JS at 17 n. 16; Playboy Br. Opposing Motion at 7 n.9. Nor do those anecdotes – virtually the whole extent of factual

support for § 505 available to the government or produced at trial, and a shadow of the records compiled in other comparable cases (such as *DAETC*, or the dial-a-porn cases) – amount to a showing of necessity sufficient to uphold § 505. Even now, nearly a full year after the complaints were filed, with § 505 never having gone into effect, the government is apparently unaware (as are we) of a single newspaper or television report, or academic or other study, pointing to "harm" warranting some governmental response more restrictive than that provided by § 504's blocking-on-request provisions. Here, as last year when the Court reversed the D.C. Circuit and upheld § 10(c) of the 1992 Cable Act, "these few examples do not necessarily indicate a significant nationwide pattern" warranting a substantial incursion on first amendment interests. *DAETC*, 116 S.Ct. at 2396-97.

4. Notwithstanding argument to the contrary (Motion at 24-25), *DAETC* does not support dismissing appellants' equal protection challenge to § 505. Although noting that "Congress need not deal with every problem at once" in the course of analyzing the restrictions on indecent programming carried on leased- and public-access channels contained in § 10 of the 1992 Cable Act, the plurality opinion did so to support the conclusion that enactment of less-restrictive alternative means of preventing the targeted harm (namely the lockbox provision of the Cable Communications Policy Act of 1984 and the CDA's provisions) evidenced that the more restrictive statute is not essential or narrowly tailored. 116 S. Ct. at 2393.

The *DAETC* passage relevant to this issue is not the one relied on by the government, but the passage considering the impact the enactment of § 504 (requiring blocking-on-request) and § 551 (requiring the V-Chip) on the constitutional review of § 10(b)'s blocking requirement:

> we can take Congress' different, and significantly less restrictive, treatment of a highly similar problem at least as some indication that more restrictive means are not "essential" (or will not prove very helpful). *Cf. Boos v. Barry*, 485 U.S. 312, 329 (1988)

> (existence of a less restrictive statute suggested that a challenged ordinance, aimed at the same problem, was overly restrictive).

116 St. Ct. at 2393.[2]

Reliance on a false arithmetic syllogism (Motion at 24) is insufficient to support the decision below, particularly where the government failed to disprove what seems obvious – namely, that far more "indecent" speech is viewed or heard on mainstream channels than on the zoned-to-the-edge-of-the-list pay-per-view channels covered by § 505. *Compare* Spice JS at 28 *with* Motion at 24-25. Laws distinguishing among speakers – and the sponsoring Senators targeted Spice and Playboy by name – cannot be justified by the one-step-at-a-time rationale that justifies such distinctions in cases of economic regulation. *See* Spice JS at 26-27.

CONCLUSION

The Court should deny the motion to affirm, note probable jurisdiction, and set the case set for plenary review.

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[2] Reliance on similar dicta from *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993), is equally misplaced. Not only was *Edge Broadcasting* a commercial speech case, but citing it for validating a restriction on speech where other, less speech-restricting means are available, fails to take account of *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996).

Respectfully submitted,

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